

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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PANLIANT FINANCIAL
CORPORATION, et al.,

Plaintiffs,

v.

ISEE3D, Inc., et al.,

Defendants.

2:12-CV-01376-PMP-CWH

ORDER

Before the Court is Plaintiffs Panliant Financial Corporation, Alan G. Smith, and A.G. Solutions Limited's Application for Default Judgment (Doc. #71) against Defendants ISEE3D, Inc. ("ISEE3D") and Ilya Sorokin ("Sorokin"), filed on July 23, 2014. Sorokin filed an Opposition (Doc. #75) on August 11, 2014. Plaintiffs filed a Reply (Doc. #77) on August 21, 2014. ISEE3D did not oppose the motion.

Also before the Court is Sorokin's Motion to Set Aside Default (Doc. #74), filed on July 30, 2014. Plaintiffs filed an Opposition (Doc. #76) on August 15, 2014. Sorokin filed a Reply (Doc. #78) on August 25, 2014.

I. BACKGROUND

The parties are familiar with the facts of this case, and the Court will not repeat them here except where necessary. On August 3, 2012, Plaintiffs filed a Complaint in this Court, alleging violations of state and federal racketeering laws, fraud, misrepresentation, unjust enrichment, and breach of fiduciary duties arising out of business disputes related to the control of ISEE3D and the consulting contract between Plaintiff Panliant Financial

1 Corporation and ISEE3D. (Compl. (Doc. #1).) Plaintiffs filed an Amended Complaint on
2 December 3, 2012. (Am. Compl. (Doc #4).) Plaintiffs moved for an enlargement of time to
3 serve all Defendants, including Sorokin and ISEE3D. (Pls.' Mot. to Enlarge Time to Serve
4 All Defs. (Doc. #6).) The Court granted a 60-day extension to complete service on all
5 Defendants, up to and including June 3, 2013. (Order (Doc. #7) at 2-3.) On June 3, 2013,
6 Plaintiffs filed a second motion to extend time, requesting an additional 180 days to
7 complete service on all Defendants. (Pls.' Second Mot. to Extend Time to Serve All Defs.
8 (Doc. #8).) The Court granted an extension of 60 days to serve all Defendants, up to and
9 including August 5, 2013, stating that an additional 180 days were not warranted. (Min.
10 Order (Doc. #9).)

11 Plaintiffs filed an affidavit of service stating the Summons and Amended
12 Complaint were served on Sorokin on July 18, 2013, "by leaving with the gate
13 guard/doorman . . . at 120 Riverside Blvd., PH 3, New York, NY 10069-0501." (Summons
14 & Proof of Service (Doc. #27) at 2 (emphasis omitted).) Sorokin submitted a declaration
15 stating that this "is the address of a corporate apartment leased by ActForex, Inc. It is used
16 by out of town company executives and occasionally clients, when they come to New York
17 City." (Def. Ilya Sorokin's Mot. to Set Aside Default (Doc. #74), Ex. B at ¶ 5.) Sorokin's
18 declaration further states that he has maintained a permanent residence in Connecticut for
19 all periods relevant to this lawsuit, and that he has a Connecticut driver's license and files
20 tax returns in Connecticut. (Id. at ¶ 6.) According to Sorokin, he became aware of this case
21 in March or April of 2014. (Id. at ¶ 8.)

22 The August 5, 2013, deadline set by the Court passed without Plaintiffs serving
23 ISEE3D. Plaintiffs did not move to extend the deadline to serve ISEE3D beyond August 5,
24 2013. More than six months after the deadline passed, Plaintiffs filed an affidavit of service
25 stating the Summons and Amended Complaint were served on ISEE3D on February 6,
26 2014, "by mail slotting them at the Registered Office address listed on the Corporate Profile

1 with Corporations Canada.” (Summons & Proof of Service (Doc. #37) at 3.)

2 Plaintiffs moved for an entry of clerk’s default on March 25, 2014. (Pls.’ Mot.
3 for Entry of Clerk’s Default (Doc. #40).) They included in their filing a declaration stating
4 Sorokin and ISEE3D had been served, had not yet appeared or otherwise responded to the
5 action, and the deadline for Sorokin’s appearance was August 8, 2013, and the deadline for
6 ISEE3D’s appearance was February 27, 2014. (Id., Decl. of Allyson R. Noto.) The Clerk
7 of Court entered default with respect to Sorokin and ISEE3D on March 26, 2014. (Default
8 (Doc. #42); Default (Doc. #43).)

9 Plaintiffs now move for default judgment against Sorokin and ISEE3D in the
10 amount of \$11,864,246.66. (Appl. for Default J. Against Defs. ISEE3D, Inc. & Ilya
11 Sorokin (Doc. #71); Proposed Default J. Against Defs. ISEE3D, Inc. & Ilya Sorokin (Doc.
12 #72).) Sorokin opposes Plaintiffs’ Motion and countermoves to set aside the Clerk’s entry
13 of default. (Def. Ilya Sorokin’s Mot. to Set Aside Default (Doc. #74); Def. Ilya Sorokin’s
14 Opp’n to Appl. for Default J. (Doc. #75).) ISEE3D did not oppose Plaintiffs’ Motion and
15 has not made an appearance in this case.

16 **II. MOTION TO SET ASIDE CLERK’S ENTRY OF DEFAULT (Doc. #74)**

17 Sorokin moves to set aside the Clerk’s entry of default, arguing the default is
18 void because he was not properly served with the Summons and Amended Complaint.
19 Specifically, Sorokin argues leaving the Summons and Amended Complaint with the
20 doorman at a building where he does not maintain his permanent residence does not
21 constitute personal service under Federal Rule of Civil Procedure 4(e). Sorokin further
22 argues the Court lacks personal jurisdiction over him. Additionally, Sorokin argues that
23 setting aside the default would not prejudice Plaintiffs, that he possesses meritorious
24 defenses, and that he lacks culpability regarding default being entered.

25 Plaintiffs respond that the default is not void because they served Sorokin in
26 accordance with Nevada Revised Statutes § 14.090(1)(a), which permits service of process

1 on a guard at a guard gate who denies access to a residence. Plaintiffs further argue that a
2 person may have more than one dwelling or usual place of abode for the purposes of
3 Federal Rule of Civil Procedure 4(e), and therefore service at the New York City apartment,
4 which belongs to a company of which Sorokin is the CEO, was proper even if Sorokin also
5 maintains a residence in Connecticut. Additionally, Plaintiffs argue the Court has personal
6 jurisdiction over Sorokin under the Racketeer Influenced and Corrupt Organizations Act, 18
7 U.S.C. § 1965(b), and under the conspiracy theory of personal jurisdiction. Finally,
8 Plaintiffs argue there is not good cause to set aside the default because Sorokin's failure to
9 respond to the Amended Complaint was culpable as he properly was served at the New
10 York City corporate apartment.

11 In his reply, Sorokin requests that the Court defer ruling on the issues of whether
12 service at the New York City corporate apartment was proper and whether there is personal
13 jurisdiction because Sorokin wishes to address these issues in subsequent briefing. (Def.
14 Ilya Sorokin's Mot. to Set Aside Default at 7 n.1; Def. Ilya Sorokin's Reply in Support of
15 Mot. to Set Aside Default (Doc. #78) at 5.) At this time, Sorokin requests that the Court set
16 aside the default only.

17 The Court may set aside the entry of default for "good cause." Fed. R. Civ. P.
18 55(c); United States v. Signed Pers. Check No. 730 of Yubran S. Mesle ("Mesle"), 615 F.3d
19 1085, 1091 (9th Cir. 2010). In ruling on a motion to set aside a default, the Court considers
20 whether the plaintiff would be prejudiced if the default is set aside, whether the defendant
21 has a meritorious defense, and whether the defendant engaged in culpable conduct that led
22 to the default. Id. The defendant bears the burden of demonstrating that these factors favor
23 setting aside the default. TCI Grp. Life Ins. Plan v. Knoebber ("TCI"), 244 F.3d 691, 696
24 (9th Cir. 2001), overruled on other grounds, Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S.
25 141 (2001). If the defendant fails to meet its burden with respect to any of these factors, the
26 Court may deny the motion to set aside the default. Mesle, 615 F.3d at 1091.

1 To determine whether the plaintiff would be prejudiced if the default judgment is
2 set aside, “[t]he standard is whether his ability to pursue his claim will be hindered.” Falk
3 v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). Setting aside a default must do more than
4 simply delay resolution of the case to be considered prejudicial to the plaintiff. TCI, 244
5 F.3d at 701. Similarly, requiring a plaintiff to adjudicate a claim on the merits does not
6 constitute prejudice. Id. Rather, the delay must result in some tangible harm, such as “loss
7 of evidence, increased difficulties of discovery, or greater opportunity for fraud or
8 collusion.” Id. (quotation omitted).

9 To satisfy the “not extraordinarily heavy” burden of presenting a meritorious
10 defense, the defendant seeking to vacate a default must present specific facts that would
11 constitute a defense. Id. at 700. There must be some possibility that the suit would have a
12 different outcome at trial than the result achieved by default. Hawaii Carpenters’ Trust
13 Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986).

14 Finally, “a defendant’s conduct is culpable if he has received actual or
15 constructive notice of the filing of the action and intentionally failed to answer.” TCI, 244
16 F.3d at 697 (emphasis and quotation omitted). However, if the defendant offers a good
17 faith explanation for its neglectful failure to answer, and that explanation negates any intent
18 to take advantage of the plaintiff, interfere with judicial decisionmaking, or otherwise
19 manipulate the legal process, such failure is not “intentional.” Id. at 697–98. For example,
20 where the defendants received actual notice of the lawsuit, but failed to answer because
21 they did not believe the court had subject matter jurisdiction, the defendants’ failure to
22 answer was not culpable. Id. at 698. Instead, a defendant’s conduct is culpable “where
23 there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad
24 faith failure to respond.” Id.

25 This test is “at bottom an equitable one, taking account of all relevant
26 circumstances surrounding the party’s omission.” Brandt v. Am. Bankers Ins. Co. of Fla.,

1 653 F.3d 1108, 1111 (9th Cir. 2011) (quotation omitted). The Court has discretion to
2 determine whether to set aside a default. O'Connor v. State of Nev., 27 F.3d 357, 364 (9th
3 Cir. 1994). The Court's discretion is especially broad when considering a motion to set
4 aside an entry of default, as opposed to a default judgment. Id. Generally, cases should be
5 decided on the merits, rather than by default. See, e.g., Mesle, 615 F.3d at 1091.

6 Here, Sorokin has demonstrated good cause to set aside the default. Sorokin's
7 failure to answer was not culpable. He has a good faith explanation for his failure to answer
8 the Amended Complaint by the deadline because Sorokin contends that service of process
9 on the doorman at the New York City corporate apartment was improper. Sorokin submits
10 a declaration stating that he did not learn of the lawsuit until March or April of 2014, that
11 upon learning of the lawsuit he contacted Plaintiffs' counsel and informed them he wished
12 to defend himself, and that within weeks of learning of the lawsuit, he traveled to Las Vegas
13 to retain counsel. This explanation negates an intent to take advantage of Plaintiffs,
14 interfere with judicial decisionmaking, or otherwise manipulate the legal process.
15 Although Plaintiffs argue the delay to the case occasioned by Sorokin's failure to answer
16 hindered the proceedings, Plaintiffs do not point to any evidence of tangible harm caused by
17 the delay.

18 Sorokin also has presented several meritorious defenses in his Motion to Set
19 Aside Default. Sorokin argues service of process was defective. Sorokin further argues the
20 Amended Complaint does not allege sufficient facts to demonstrate the Court has personal
21 jurisdiction over him. Specifically, Sorokin argues the Amended Complaint does not allege
22 any facts indicating that he has continuous, systematic contacts with Nevada, that he has
23 purposely directed his activities to Nevada, or that the claims against him arise from his
24 contacts with Nevada. Sorokin further contends Plaintiffs' claims are defectively pled, that
25 he does not owe a fiduciary duty to Plaintiffs, that any of his actions related to removing
26 Plaintiff Smith from ISEE3D's board of directors are protected by the business judgment

1 rule, and that he has various affirmative defenses. Because Sorokin has raised these
2 defenses, there is at least some possibility that the outcome of Plaintiffs' claims will be
3 different at trial than the outcome by default.

4 Sorokin notes that Plaintiffs would not be prejudiced if the default was set aside
5 because discovery has not closed and Plaintiffs otherwise have not been hindered in pursuing
6 their claims. Although Plaintiffs argue Sorokin's failure to respond to the Amended
7 Complaint was culpable and resulted in delay, they do not argue it has resulted in loss of
8 evidence or increased difficulties of discovery, or that it has increased the possibility of
9 fraud by Defendants. Setting aside a default must do more than simply delay resolution of
10 the case to be considered prejudicial to Plaintiffs. TCI, 244 F.3d at 701. Thus, Plaintiffs
11 would not be prejudiced if the Court sets aside the entry of default. Finally, setting aside
12 the default promotes the policy of deciding cases on the merits, rather than by default. The
13 Court therefore will grant Sorokin's Motion to Set Aside the Default.

14 **III. APPLICATION FOR DEFAULT JUDGMENT (Doc. #71)**

15 Plaintiffs move for default judgment against ISEE3D¹ in the amount of
16 \$11,864,246.66, arguing default judgment is appropriate under the circumstances of this
17 case. Specifically, Plaintiffs argue that they will suffer prejudice if a default judgment is
18 not entered, that the merits of their claims and sufficiency of the Amended Complaint favor
19 entry of default judgment, and that the amount of damages they are seeking is appropriate in
20 light of ISEE3D's conduct. Plaintiffs further argue there is no possibility of dispute
21 concerning material facts due to ISEE3D's failure to participate in this case. Plaintiffs
22 contend ISEE3D's failure to answer or otherwise respond to the Amended Complaint was
23 not due to excusable neglect because ISEE3D received service of the Summons and
24 Complaint six months before Plaintiffs filed the Application for Default Judgment, and

25 ¹ Plaintiffs also move for default judgment against Sorokin, however, Plaintiffs' Motion is
26 moot as to Sorokin given that this Order vacates the Clerk's entry of default as to Sorokin.

1 given the extended period of time ISEE3D has had notice of the action, the possibility of
2 excusable neglect is “de minimis.” (Appl. for Default J. (Doc. #71) at 9.) Finally, Plaintiffs
3 argue a decision on the merits is impractical given ISEE3D’s failure to participate in the
4 case.

5 Federal Rule of Civil Procedure 4(m) establishes the time for service on domestic
6 defendants:

7 If a defendant is not served within 120 days after the complaint is filed, the
8 court—on motion or on its own after notice to the plaintiff—must dismiss the
9 action without prejudice against that defendant or order that service be made
10 within a specified time. But if the plaintiff shows good cause for the failure,
the court must extend the time for service for an appropriate period. This
subdivision (m) does not apply to service in a foreign country under Rule 4(f) or
4(j)(1).

11 The Court must extend the 120-day time limit of Rule 4(m) if the serving party shows good
12 cause for failure to serve within 120 days. Lemoge v. United States, 587 F.3d 1188, 1198
13 (9th Cir. 2009). If the serving party does not show good cause, the Court has discretion to
14 extend time for service, or to dismiss the complaint without prejudice. In re Sheehan, 253
15 F.3d 507, 513 (9th Cir. 2001). The Court’s discretion to extend time for service, or to
16 dismiss without prejudice for failure to timely serve, is broad. Id. The Court may extend
17 time for service even after the 120-day period expires. Efaw v. Williams, 473 F.3d 1038,
18 1041 (9th Cir. 2007).

19 By its terms, Rule 4(m) does not apply to service in a foreign country, and Rule
20 4(m)’s 120-day limit does not govern service of a foreign defendant. Lucas v. Natoli, 936
21 F.2d 432, 432–33 (9th Cir. 1991). Rather, Rule 4(h)(2) and Rule 4(f) govern service on a
22 foreign corporation. Neither Rule 4(h)(2) nor Rule 4(f) contain an express time limit for
23 service.

24 Here, Plaintiffs twice moved the Court for an extension of time to serve all
25 Defendants. Both times, Plaintiffs raised the issue that all Defendants except Defendant
26 Bay Management Ltd. were foreign. The Court set a service deadline that applied to all

1 Defendants, including those that the Court understood to be foreign. In their second
2 Motion, Plaintiffs asked for a 180-day extension. The Court ruled that 180 days were not
3 necessary and set August 5, 2013, as the deadline to accomplish service on all Defendants,
4 foreign and domestic. Plaintiffs accomplished service on ISEE3D on February 6, 2014,
5 which was 185 days after the court-ordered deadline. Plaintiffs therefore failed to timely
6 serve ISEE3D. Absent proper service of process, the Court lacks jurisdiction to enter
7 default judgment against ISEE3D. See S.E.C. v. Ross, 504 F.3d 1130, 1138-39 (9th Cir.
8 2007) (stating that a default judgment is void if the defendant to the suit was never properly
9 served). The Court therefore will deny Plaintiffs' Application for Default Judgment.

10 Given that Plaintiffs failed to timely serve ISEE3D by the deadline imposed by
11 this Court, the Court further orders Plaintiffs to show cause, in writing no later than January
12 6, 2015, why this action should not be dismissed as to ISEE3D pursuant to Federal Rule of
13 Civil Procedure 4(m). In doing so, Plaintiffs shall address whether there is good cause why
14 service was not made by the court-ordered deadline. The parties are advised that in the
15 Court's view, Plaintiffs' failure to comply with the court-ordered deadline, combined with a
16 failure to request an extension of that deadline, weighs strongly against a finding of good
17 cause.

18 **IV. CONCLUSION**

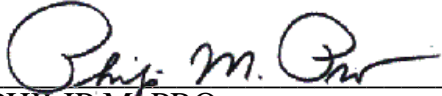
19 IT IS THEREFORE ORDERED that Defendant Ilya Sorokin's Motion to Set
20 Aside Default (Doc. #74) is hereby GRANTED. The Entry of Clerk's Default against
21 Defendant Ilya Sorokin (Doc. #42) is hereby VACATED.

22 IT IS FURTHER ORDERED that Defendant Ilya Sorokin shall answer or
23 otherwise respond to the Amended Complaint within twenty-one (21) days from the date of
24 this Order.

25 IT IS FURTHER ORDERED that Plaintiffs' Application for Default Judgment
26 (Doc. #71) is hereby DENIED.

1 IT IS FURTHER ORDERED that Plaintiffs shall show cause, in writing no later
2 than January 6, 2015, why this action should not be dismissed as to Defendant ISEE3D, Inc.
3 Failure to do so will result in the automatic dismissal of this action, without prejudice, as to
4 Defendant ISEE3D, Inc.

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6 DATED: December 29, 2014

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9 PHILIP M. PRO
United States District Judge